



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for April 28, 2023**

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### **BOARD DECISIONS**

**Appellant:** Mikhail Semenov  
**Agency:** Department of Veterans Affairs  
**Decision Number:** [2023 MSPB 16](#)  
**Docket Number:** PH-0714-19-0128-I-1  
**Issuance Date:** April 25, 2023

#### **VA Accountability Act**

The appellant, a Research Health Scientist, filed an appeal with the Board challenging his performance-based removal under the authority of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (VA Accountability Act), Pub. L. No. 115-41, § 202(a), 131 Stat. 862, 869-73 (codified at 38 U.S.C. § 714). The appellant raised affirmative defenses of national origin discrimination and whistleblower reprisal. The administrative judge affirmed the agency's removal action, finding that the agency proved its charge by substantial evidence and that the appellant had failed to prove his affirmative defenses. The administrative judge concluded that, because the agency had proved its charge by substantial evidence, he was required to affirm the penalty of removal. The appellant filed a petition for review.

**Holding:** The elements for a performance-based charge under chapter 43 do not apply to performance-based actions taken under 38 U.S.C. § 714; instead, the proper elements for such cases derive from the Board's application of 5 U.S.C. chapter 75.

1. The Board explained that, in finding that the agency proved its charge, the administrative judge required the agency to prove by substantial evidence not only that the appellant failed to meet a particular requirement, but also that the performance standard at issue was "reasonable, realistic, [and] attainable," i.e., requirements that derive from Board precedent under 5 U.S.C. chapter 43.
2. The Board explained that Federal agencies generally rely on one of two statutory procedures in removing a tenured employee, i.e., 5 U.S.C. chapter 75 and 5 U.S.C. chapter 43, the latter of which provides agencies with greater flexibility. The Board explained that the VA Accountability Act provides the agency with an alternative, expedited procedure for disciplinary actions.
3. In determining what substantive standard should apply to performance-based actions taken under the VA Accountability Act, the Board began by reviewing the statutory language. The Board reasoned that 38 U.S.C. § 714(c)(3) states that chapter 43 procedures do not apply to removals, demotions, or suspensions taken under the Act; accordingly, the Board found that Congress did not intend for the Board to apply the chapter 43 standard to performance-based actions taken pursuant to 38 U.S.C. § 714.
4. The Board explained that, in taking a chapter 75 performance-based action, an agency is not bound by any chapter 43 requirements, e.g., proving the validity of its performance standards. Indeed, under chapter 75, an agency must prove only that its performance standard was reasonable and provided for accurate measurement of the appellant's performance, and that the appellant's performance was unacceptable according to that measurement. The Board reasoned that the chapter 75 standard was consistent with the Act, specifically 38 U.S.C. § 714(a)(1).
5. The Board remanded the matter for further adjudication under the appropriate standard.

**Holding:** The U.S. Court of Appeals for the Federal Circuit's decision in *Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir. 2021), which found that substantial evidence is the standard of review for the Board and not the agency in 38 U.S.C. § 714 cases, applies to all pending cases, regardless of when the events at issue took place. The harmful error standard set forth in 5 U.S.C. § 7701(c)(2) should be applied

**in analyzing whether the agency's use of the substantial evidence standard constituted harmful error.**

1. The Board explained that, after the initial decision was issued, the Federal Circuit issued *Rodriguez*, wherein it found that the agency deciding official must apply a preponderance of the evidence standard, i.e., that the substantial evidence standard applies only to the Board.
2. The Board concluded that *Rodriguez* applies to all pending cases, regardless of when the events at issue took place. Because the administrative judge and the parties did not have the benefit of *Rodriguez*, the Board remanded the matter for adjudication of whether the agency's use of the substantial evidence standard constituted harmful error.
3. The Board reasoned that, although 38 U.S.C. § 714 does not contain any language regarding the adjudication of a claim of harmful agency error, it was appropriate to apply the harmful error standard from 5 U.S.C. § 7701(c)(2). The Board indicated that, on remand, the administrative judge should provide the parties with an opportunity to present evidence and argument, including a supplemental hearing, addressing whether the agency's use of the substantial evidence standard in the removal decision constituted harmful error.

**Holding: Whistleblower reprisal claims raised under the VA Accountability Act should be adjudicated in the same manner as whistleblower reprisal claims raised in chapter 43 and chapter 75 proceedings.**

1. The Board explained that, in chapter 43 and chapter 75 proceedings, the Board adjudicates an appellant's claim of whistleblower reprisal as an affirmative defense and it summarized the analytical framework for such claims.
2. The Board found that it was appropriate to apply the same analytical framework to claims of whistleblower reprisal raised in an appeal of an action taken pursuant to the VA Accountability Act. In so finding, the Board reasoned that Congress intended to preserve and expand preexisting protections for whistleblowers.
3. The Board ordered the administrative judge to reconsider the appellant's whistleblower reprisal claim, to include a new analysis of the *Carr* factors. The Board also ordered the administrative judge to address additional disclosures and activities raised by the appellant, including his claim that he had contacted the agency's Office of the Inspector General.

**Holding: The Board should review the agency's penalty determination in**

**38 U.S.C. § 714 cases to determine whether the agency proved by substantial evidence that it properly applied the relevant *Douglas* factors and whether the agency’s penalty was reasonable.**

1. The Board explained that, at the time the initial decision was issued, the administrative judge did not have the benefit of the Federal Circuit’s decisions in *Sayers v. Department of Veterans Affairs*, 954 F.3d 1370 (Fed. Cir. 2020), *Brenner v. Department of Veterans Affairs*, 990 F.3d 1313 (Fed. Cir. 2021), and *Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir. 2021); thus, he did not review the agency’s penalty determination or address the *Douglas* factors.
2. In *Sayers*, the Federal Circuit clarified that, although the Board may not mitigate the agency’s penalty, 38 U.S.C. § 714 nonetheless “requires the Board to review for substantial evidence the entirety of the [agency’s] removal decision—including the penalty—rather than merely confirming that the record contains substantial evidence that the alleged conduct leading to the adverse action actually occurred.” *Sayers*, 954 F.3d at 1379. Thereafter, in *Brenner*, the Federal Circuit found that the Board’s review must include the agency’s penalty determination regardless of whether misconduct or performance precipitated the agency action. *Brenner*, 990 F.3d at 1323-27.
3. The Board reasoned that, apart from the requirement that the agency’s decision be supported by substantial evidence, the VA Accountability Act provides no guidance regarding the Board’s review of the agency’s penalty determination. The Board also reasoned that, because it does not review the agency’s penalty in chapter 43 actions, it could not glean any guidance on the penalty issue from that line of cases.
4. Although the VA Accountability Act prohibits the Board from mitigating the agency’s penalty, the Board concluded that the penalty analysis framework for chapter 75 cases is otherwise consistent with the Act and, therefore, should be applied to 38 U.S.C. § 714 cases. This penalty review essentially ensures that the agency conscientiously considered the relevant factors and struck a responsible balance of the factors within tolerable limits of reasonableness.
5. The Board explained that, consistent with the Federal Circuit’s decision in *Connor*, if the Board determines that the agency did not properly consider these factors or the chosen penalty is unreasonable, then the matter should be remanded to the agency for reassessment of the penalty.
6. The Board explained that, on remand, the administrative judge should permit the parties to submit additional evidence and argument regarding the penalty issue.

The Board also addressed additional issues raised by the appellant. To this end, the Board ordered the administrative judge to do the following: (1) consider additional claims raised by the appellant under the harmful error standard, including a claim that the agency failed to comply with performance appraisal procedures; (2) address the appellant's argument that the agency violated merit systems principles; (3) reassess the appellant's affirmative defense of national origin discrimination consistent with the Board's decision in *Pridgen v. Office of Management and Budget*, 2022 MSPB 31; and (4) consider a due process claim that the appellant raised for the first time on review.

## COURT DECISIONS

### NONPRECEDENTIAL:

*Hobson v. Department of Defense*, No. [2023-1258](#) (Fed. Cir. April 21, 2023) (CH-1221-15-0470-W-1) The court dismissed Ms. Hobson's petition for review of the Board's final decision because it was filed outside of the statutory deadline. The court found unavailing Ms. Hobson's contention that she had mailed her petition prior to the deadline, explaining that a petition must be received by the court within 60 calendar days after the Board issues notice of the final decision.

*Toby v. Department of Veterans Affairs*, No. [2022-1024](#) (Fed. Cir. April 27, 2023) (PH-0752-15-0289-B-1) The court dismissed as moot Mr. Toby's petition for review of the Board's decision, which reversed the agency's removal action. The court recounted the lengthy procedural history of the matter and thereafter concluded that Mr. Toby had already received all of the relief for which he was eligible.